No. 96-720

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

KEVIN P. KIENZLE,

Petitioner,

vs.

ENGLEWOOD DISPOSAL CO., INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Pursuant to Supreme Court Rule 29(6), the following constitutes a list of all parent companies and non-wholly owned subsidiaries of Liberty Mutual Insurance Company and Englewood Disposal Company, Inc.:

(1) Liberty Mutual is a 25% owner of Premier Treatment and Health Centre, Inc.

(2) Liberty Mutual is a 40% owner of Liberty Mutual Bermuda, Ltd.

(3) Liberty Mutual is a 42% owner of St. James Court, Ltd.

(4) Liberty Mutual is a 19.5% owner of Stuart Ins. Company.

(5) Liberty Mutual has numerous other wholly owned subsidiaries.

(6) There is no parent company or non-wholly owned subsidiaries of Englewood Disposal Co., Inc.

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STATEMENT OF JURISDICTION

This Court does not have jurisdiction to review this case because the Petition for Writ of Certiorari was untimely. This Court also cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a), because the principle question presented for review was never presented to the Florida courts. These newly presented arguments, therefore, may not properly be considered.

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for Writ of Certiorari. Respondents also respectfully correct a couple of misstatements contained in the Petitioner's Statement of the Case. First, contrary to the Petitioner's claim that he "had an on-the-job-accident which resulted in psychiatric disabilities," *no* evidence was presented in the proceedings below establishing that the Claimant/Petitioner had a mental impairment and resulting psychiatric disabilities. Second, the Supreme Court of Florida did not deny certiorari in this case; rather, the court noted that it was without jurisdiction and dismissed the petition for review. This crucial distinction affects this Court's jurisdiction as discussed below.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITION BECAUSE IT WAS UNTIMELY.

The Petitioner, Kevin Kienzle, is asking this Court to exercise its discretionary certiorari jurisdiction to review a July 18, 1996 decision issued in a workers' compensation matter by the First District Court of Appeal of Florida. As the foundation

for jurisdiction in this Court, he claims the Supreme Court of Florida denied his timely petition for certiorari on August 20, 1996. Thus, he no doubt believes that the instant petition, served on November 5, 1996, and filed with the court on November 6, 1996, is timely. That belief is erroneous.

Pursuant to Supreme Court Rule 13, a petition for writ of certiorari to review a judgment in any civil case entered by a state court of last resort

> is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk of this Court within 90 days after entry of the order denying discretionary review.

Unless a petition for rehearing is sought in the lower court, the time to file a petition for writ of certiorari "runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice)." Supreme Court Rule 13. The ninety-day time limit for filing a petition for writ of certiorari in a civil case is *mandatory* and *jurisdictional*. *See* 28 U.S.C. § 2101(c). *See also Federal Election Commission v. NRA Political Victory Fund*, __ U.S. __, 115 S. Ct. 537, 539 (1994). If that deadline is not met, this Court has no "authority to extend the period for filing except as Congress permits," and must dismiss the petition for certiorari for want of jurisdiction. *Id.* at 544-45.

In this case, the date of entry of the judgment or order sought to be reviewed is July 18, 1996, the date of the First District

Court of Appeal's decision. No motion for rehearing was sought by the Petitioner in that court. Instead, the Petitioner filed a "notice of appeal" dated August 12, 1996, seeking review of the July 18, 1996 order by the Supreme Court of Florida. The notice of appeal recited that the "Supreme Court has jurisdiction over this matter pursuant to Rule of Appellate Procedure 9.030 (a) (2) (A) (i) and (iv)." Those provisions grant the Supreme Court of Florida discretionary review over decisions of district courts of appeal that "(i) *expressly* declare valid a state statute; . . . (iv) *expressly* and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law" (emphasis added). The question then becomes whether the judgment of the First District Court of Appeal was a judgment that was subject to discretionary review by the Supreme Court of Florida, so as to start the 90 day clock running on August 20, 1996, or whether the decision of the First District was in fact the judgment of the state court of last resort, so as to commence the running of the 90 day jurisdictional time period on July 18, 1996.

In dismissing the petition for review in this case, the Supreme Court of Florida cited *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). In *Jenkins*, the decision sought to be reviewed was a district court of appeal decision which read in its entirety "Per Curiam Affirmed," but was also accompanied by a dissenting opinion. The question before the court was whether it had jurisdiction to review the matter. The court held that it did not. In reaching that conclusion, the court analyzed the history of the review process in Florida and the affect on that process by a 1980 amendment to the Florida Constitution. Prior to the amendment, the Supreme Court of Florida had jurisdiction to review by certiorari "any decision of a district court of appeal . . . that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law." 385 So. 2d at 1357. As a result, the court had often granted

review based on dissenting opinions, even though the majority decision was rendered without opinion. *Id.* at 1358.

After April 1, 1980, the state constitution was amended with respect to review of conflicting decisions as follows:

> May review any decision of a district court of appeal . . . that *expressly* and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. . . .

Jenkins, 385 So. 2d at 1357 (emphasis in original). The court found that the revised language left no room for doubt that it could only "review a decision of a district court of appeal that *expressly* and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law." *Id.* at 1359 (emphasis in original). The court noted that the single word "affirmed" comported with none of the definitions of the term "express," and further noted that the "language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the *decision* of the district court of appeal." *Id.* Accordingly, the court held that after April 1, 1980,

> the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court.

Jenkins v. State, 385 So. 2d at 1359. *See also Jollie v. State*, 405 So. 2d 418 (Fla. 1981) (mere citation per curiam affirmed decision rendered in traditional form will remain non-reviewable by Supreme Court); *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304 (Fla. 1980) (all writs provision of state constitution cannot be used to circumvent ruling that court lacks jurisdiction to review per curiam decisions of district courts of appeal).

Also instructive is *The Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988). There, this Court certified a question regarding the state court's subject matter jurisdiction over the newspaper's appeal. At issue was which decision constituted the final decision of the highest state court empowered to review the matter for purposes of timely review in this Court: the decision of the district court of appeal, or the supreme court's order summarily denying discretionary review? The Florida court ruled that even though it had ultimately denied review, complete subject matter jurisdiction over the case had nevertheless existed

> to hear *B.J.F.* and decide the case on its merits with finality. This jurisdiction must be regarded as complete until the time the petition for review was denied. Moreover, the denial of review in *B.J.F.* did not operate to deprive this Court of its subject-matter jurisdiction retroactively, but merely constituted the point in time at which jurisdiction, for whatever reason, had ended.

530 So. 2d at 289. Relevant here, however, is the Supreme Court of Florida's specific recognition that it *did not* have

> subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued

> without opinion or citation. Thus, *a district court decision rendered without an opinion or citation constitutes a decision from the highest state court empowered to hear the cause*, and an appeal may be taken directly to the United States Supreme Court.

The Florida Star, 530 So. 2d at 288 n. 3. (emphasis added).

Applying the above-cited principles to this case shows that the First District Court of Appeal's July 18, 1996 decision constituted the decision "from the highest state court empowered to hear the cause." Therefore, Mr. Kienzle was required to seek review in this Court directly from the July 18, 1996 decision. That means that in order to be timely, his petition for writ of certiorari had to be filed with this Court within 90 days, or by October 16, 1996. Since the petition was not filed with the clerk until November 6, 1996, it is untimely. This defect is fatal and leaves the court with no choice but to dismiss the petition for certiorari for want of jurisdiction. *Federal Election Commission v. NRA Political Victory Fund*, __ U.S. __, 115 S. Ct. 537 (1994).

II.

MR. KIENZLE HAS NOT SHOWN ANY GROUNDS FOR THIS COURT TO GRANT HIS PETITION FOR WRIT OF CERTIORARI IN THIS MATTER.

Even if this Court could somehow find the petition is timely, jurisdiction should still be denied. Pursuant to Supreme Court Rule 10, review "on a writ of certiorari is not a matter of right," but is committed to the absolute discretion of this Court. Therefore, such review will only be granted for the most compelling reasons. Among those reasons are that:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10.

Although less than clear, Mr. Kienzle is apparently claiming that the Court should exercise its certiorari jurisdiction in this case because the First District Court of Appeal's decision conflicts with decisions of other state and federal courts. More specifically, he claims that Florida courts have already:

> created the scenario feared in *Muller* and *Hutchinson* — wherein the discrimination of one disabled person in favor of another disabled person is permitted. At the very least, there is a discrepancy between jurisdictions as to the interpretation of the ADA — whether it applies only to a disabled plaintiff versus a non-disabled person or whether, as in the Iowa cases, the ADA was intended to prohibit discrimination against the disabled regardless of whether it is in favor of a non-disabled person or a person with lesser disabilities.

(Petition at p. 22).

As shown by the decision sought to be reviewed, the First District Court of Appeal did not issue a written opinion. Instead, the court issued a per curium affirmance or PCA. Florida courts uniformly hold that such decisions have no precedential value, for they do not establish any point of law. That is because the courts recognize there "is no presumption that the affirmance was on the merits," and further, that the "rationale and basis for the decision without opinion is always subject to speculation." *Department of Legal Affairs v. District Court of Appeal, 5th District*, 434 So. 2d 310, 311-12 (Fla. 1983). Such uncertainty, therefore, "in itself negates a basis for reliance on an unwritten decision for guidance or precedence." *Id.* at 321.

Moreover, as explained above, the Supreme Court of Florida has ruled that it has no jurisdiction to review a PCA decision of a district court of appeal because such a decision can in no way be said to expressly and directly conflict with a "decision of another district court of appeal or the Supreme Court on the same question of law." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). In other words, it amounts to nothing more than pure speculation as to whether or not an appellate court in Florida, when issuing a PCA decision, has even reached, let alone ruled upon, the merits of the claims asserted by the parties.

In this case, it is nothing more than pure speculation for the Petitioner to claim that the First District Court of Appeal's decision has in any way created or announced a rule of law that conflicts with opinions of other state and/or federal courts, one that will influence other courts to rule the same way, or one that has decided such an important question of federal law that should be settled by this Court. The court announced nothing but "affirmed." Such a pronouncement falls far short of the compelling reasons this Court considers when exercising its judicial discretion. This Court should not accept certiorari jurisdiction in this matter, and Mr. Kienzle's petition should be denied.

III.

THIS COURT HAS NO JURISDICTION TO CONSIDER MOST OF PETITIONER'S ARGUMENTS.

This Court prudently declines to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519 (1992) (in reviewing judgments of state courts pursuant to 28 U.S.C. § 1257, the court will refuse to consider claims that were not raised or addressed below); *Beck v. Washington*, 369 U.S. 541 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court).

The law in Florida is consistent with federal law; that is, arguments not presented to the lower court cannot be raised for the first time on appeal. Florida courts take it a step further, and also prohibit a party from raising new issues in a reply brief, at oral argument, or in a motion for rehearing. *See, e.g., J.A.B. Enterprises v. Gibbons*, 596 So. 2d 1247 (Fla. 4th DCA 1992); *Taylor v. Johnson*, 581 So. 2d 1333 (Fla. 1st DCA 1990); *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So. 2d 958 (Fla. 4th DCA 1984).

Turning to this case, this Court should deny the petition for writ of certiorari because the arguments advanced by Mr. Kienzle were never properly presented to the First District Court of Appeal of Florida. In the petition submitted to this Court, Mr. Kienzle focuses on the issue of whether Florida law violates Title II of the Americans with Disabilities Act with respect to workers' compensation coverage for "mental disabilities." His arguments, although once again less than clear, are premised on his claim that Title II of the Act prohibits states, such as Florida, from discriminating against individuals with disabilities, and

that not only is no disparate treatment allowed between groups of disabled, but the ADA mandates application of a heightened level of scrutiny when reviewing such matters, rather than simply a rational basis test or the "no scrutiny" test he claims occurred in this case. He also contends that the decisions of the state supreme court (and presumably the district court of appeal which issued the PCA in question)[1], and the definition of the term "accident" contained in § 440.02(1), Fla. Stat. (1994 Supp.), permit "discrimination among the members of the ostensibly protected class" (Petition at p. 22), which requires this Court to resolve the matter.

Although not mentioned by the Petitioner, in the proceedings before the First District Court of Appeal, Mr. Kienzle's initial and reply briefs asserted the following issue: "WHETHER SECTIONS 440.02(1) and 440.09, FLORIDA STATUTES (1993) IS SUBJECT TO AND COMPORTS WITH THE REQUIREMENTS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT?" The arguments in the Petitioner's appellate briefs and the Respondent's answer brief were solely addressed to the parties' respective positions on that specific issue. Title II of the Act was not raised or addressed. Even at the video-teleconferencing oral argument before the First District, it was the Petitioner's opening position that the Florida Workers' Compensation Act violated Title I of the ADA. It was not until the rebuttal portion of Mr. Kienzle's oral argument that counsel even brought up Title II of the ADA. At that point, Judge Davis, speaking for the court, reminded counsel of the issue that had been raised in the briefs (Title I), and advised him that it was inappropriate and far to late in the proceedings to inject a new issue. Because the issue Mr. Kienzle asks this Court to resolve was never raised below and, therefore, not ruled on by

1. Note that the judge of compensation claims did not have jurisdiction to consider or rule on the ADA assertions. *See B&B Steel Erectors v. Burnsed*, 591 So. 2d 644 (Fla. 1st DCA 1991).

the state appellate court, this Court should decline his invitation to do so at this late date.

IV.

THE PETITIONER LACKS STANDING TO ASSERT A TITLE I ADA VIOLATION.

Finally, and out of an abundance of caution, the Respondents will reiterate the position they asserted below with respect to Mr. Kienzle's challenge to the Florida Workers' Compensation Act based on Title I of the ADA. The gist of that argument is that Mr. Kienzle lacks standing to assert such a challenge. This argument is presented with the caveat that because the First District Court of Appeal issued a PCA decision, it is pure speculation whether or not the court even reached the merits of the case, as was discussed in the previous section.

In order to state a cause of action under the Americans with Disabilities Act, the complaining party must show that he (1) is disabled as defined under the ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job at issue; (3) was terminated or denied certain employment benefits, for which he was otherwise eligible, by a covered entity; and (4) such termination or denial of benefits was based upon a disability. *Harding v. Winn-Dixie Stores, Inc.*, 907 F. Supp. 386, 389-90 (M.D. Fla. 1995). As each of these elements must be proven, the failure of a plaintiff to establish one element will defeat his entire claim. *Id.*

Courts interpreting the ADA, "have found that only persons with disabilities who are "qualified" for the position they hold or desire may state a claim for discrimination under the Act." *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. 1321, 1326 (W.D. Tenn. 1995), *affirmed in part, reversed in part*, 99 F.3d

181 (6th Cir. 1996). As a first step, the complainant must establish that he is "a qualified individual with a disability." The ADA defines the term "disability" as (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual. Included are such things as walking, speaking, breathing, performing manual tasks, seeing, hearing, caring for oneself, and working. 29 C.F.R. § 1630.2(i); (2) a record of such impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2); *Harding v. Winn-Dixie Stores, Inc.*, 907 F. Supp. at 390. Furthermore, a "qualified individual with a disability" is a disabled individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position the individual holds or desires, and who meets the eligibility requirements for the receipt of services of which he is being allegedly unfairly denied." 907 F. Supp. at 390.

A recent decision involving an ADA challenge to the Florida Workers' Compensation Act recognized "that there is case authority for dismissing a case where the plaintiff essentially admits that he cannot perform the essential functions of the position." *Cramer v. State*, 885 F. Supp. 1545, 1550 (M.D. Fla. 1995). One such case, *Parker v. Metropolitan Life Ins. Co., supra*, while finding that it might seem undesirable and "perhaps unpalatable that a totally disabled individual is not entitled to relief under Title I of the ADA," nevertheless held that the plain language of the Act clearly indicated "that the ADA was designed to afford relief only to those individuals with disabilities that can perform the essential functions of the job that they hold or seek." 875 F. Supp. at 1326. The court found that:

> A review of the legislative history of Title I also supports the conclusion that this portion of the statute seeks to prohibit discrimination only against qualified individuals with

> disabilities. Thus, although plaintiff have been "qualified" to perform the essential functions of her job at the time of her enrollment in the plan, she has not shown that she was a "qualified individual *with a disability*" at that time. Thus, plaintiff is not a "qualified individual with a disability" as defined by Title I of the Act, and plaintiff does not have standing to sue under Title I of the ADA.

Id. (footnotes omitted; emphasis in original). *See also Cramer v. State*, 885 F. Supp. at 1550 (questioning, though not deciding, whether plaintiffs were qualified individuals with a disability since at the date they applied for workers' compensation benefits and were denied, plaintiffs alleged they were not capable of performing their jobs).

In this case, Mr. Kienzle failed to show that he had standing to raise the instant ADA challenge. First, he did not show that he had an impairment which "substantially limits a major life activity." There was no evidence, medical or otherwise, in the record establishing whether the Claimant's alleged mental "disability" impacted his life to the degree that it constituted a disabling impairment, or whether it was a "temporary, non-chronic impairment of short duration, with little or no long term or permanent impact," which would not be considered a disability under the Act. *See* 29 C.F.R. § 1630.2(j). In the absence of such a showing, Mr. Kienzle did not fall within the protections of the ADA.

Even if the Petitioner could be considered an individual with a "disability," there was no showing that he was a "qualified individual with a disability within the meaning of the ADA." *Cramer v. State*, 885 F. Supp. at 1550. In other words, Mr.

Kienzle did not show that he was otherwise qualified for the job he held prior to the alleged disability; that is, that he was an individual with a disability who could perform the essential functions of the job that he held or sought. Indeed, at the time that Mr. Kienzle applied for workers' compensation benefits, and they were denied, he alleged that he was temporarily and totally disabled, and apparently not capable of performing his job. Because the ADA was designed to afford relief *only* to those individuals who can perform the essential functions of the job that they hold or seek, Mr. Kienzle was not a "qualified individual with a disability" as defined by Title I of the ADA. Therefore, he did not have standing to bring this challenge and this Court should deny the requested relief. *See Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996); *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996); *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. at 1326; *Cramer v. State*, 885 F. Supp. at 1550. *See also Tyndall v. National Educ. Centers*, 31 F. 3d 209 (4th Cir. 1994); *Cheatwood v. Roanoke Industries*, 891 F. Supp. 1528 (N.D. Ala. 1995); *Ethridge v. State of Alabama*, 860 F. Supp. 808 (M.D. Ala. 1994).

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be dismissed, or alternatively, denied.

Respectfully submitted,

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